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SUMMARY RECORD OF THE 539th MEETING

Held at Headquarters, New York,
on Monday, 13 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section M

1. Mr. HOLTZMANN (United States of America), supported by Mr. GOH (Singapore), recalled that during the drafting of the Arbitration Rules, UNCITRAL had fully discussed the question of the language of arbitral proceedings, and that the appropriate guidelines were set out in article 17 of the Rules. The secretariat might therefore wish to bear the provisions of article 17 in mind when that section of the draft was revised.

2. Another source of concern for his delegation was the order of certain topics on the list. In the UNCITRAL Arbitration Rules and Model Law, the order of topics was somewhat different from the one followed in the check-list of possible topics for preparatory conferences. Language, for example, was a topic which appeared much earlier in the Rules, well before such topics as witnesses, hearings and written submissions. In the interest of clarity and to facilitate the search for rules, the secretariat might consider following the same general order as that of previous UNCITRAL documents.

Chapter III, section N

3. Mr. HOLTZMANN (United States of America) suggested that in preparing the revised version of the draft, the secretariat might mention the fact that administrative support was often provided by arbitral institutions. There was a broad network of such institutions throughout the world, and it must be recognized that they operated not only independently, but in cooperation with one another.

Chapter III, section O

4. Mr. KOUVSHINOV (Russian Federation) said that some legal systems had another office in addition to that of secretary or registrar, called rapporteur in Russian. That person played an active role in keeping the arbitrators informed of the substance of the matters under consideration.

5. The CHAIRMAN suggested that the representative of the Russian Federation should tell the secretariat which term he considered most appropriate or what the duties of the person occupying the position to which he had referred were.

Chapter III, section P

6. The CHAIRMAN noted that paragraph 2 was in square brackets, which indicated that the secretariat had left it to the Commission to determine whether it should be included in the document.

7. Mr. HOLTZMANN (United States of America) said that the purpose of paragraph 2 was to provide the arbitral tribunal with instructions concerning

the factors which it should take into account. It was not necessarily a topic for the preparatory conference, but sought to inform the arbitral tribunal of what it ought to do or of considerations it might take into account after a preparatory conference or as the result of one. Such general instructions were unnecessary in the document under consideration. Furthermore, the order in which factors were listed, from (a) to (g), seemed to suggest that some were more important than others. For example, the question relating to the enforcement of awards was mentioned last, perhaps because enforcement was the last stage in the chronology of events; in any case, that placement tended to give the impression that there was an order of importance. The simplest solution was to delete paragraph 2 entirely.

Chapter III, section Q

8. Mr. BONELL (Italy) proposed that the section should be deleted from the check-list. In the first place, he did not see the purpose of paragraphs 1 to 3 under item (i). If the arbitral tribunal sought the views of the parties, which would be surprising at such an early stage, either both parties might refuse to reply, which would make the arbitrators feel uncomfortable, or else they might begin to argue. He also wondered what would happen if one of the parties gave incorrect information or refused to disclose certain information.

9. Although he did not reject point (ii) quite so categorically, he did believe it was a question which the arbitrators should decide or, as was the case under the legal system of some countries, it might be something that should be left entirely to the discretion of a particular party. He would therefore prefer that item Q should not be included in the check-list.

10. Mr. ABASCAL ZAMORA (Mexico) suggested that section Q should be deleted from the check-list. Mandatory provisions did exist, and it was up to the arbitrators to obtain knowledge of and interpret them. The task referred to in item (ii) was the responsibility of the parties. The mandate of the arbitrators terminated when they made an award, and it generally was the responsibility of the parties to file the award in places where such a requirement existed. To suggest otherwise might encourage inexperienced arbitrators to take that step, when in reality those responsibilities did not arise until after the award was made.

11. Mr. HOLTZMANN (United States of America) said that he, too, had reservations regarding the paragraphs under item (i) and would not object to their deletion, although he would prefer to retain item (ii). In some countries the arbitral tribunal itself was required to register the award. Accordingly, if arbitrators from other countries were involved in arbitral proceedings in a place where the requirement existed, it was important to think about what would happen if those arbitrators were not told about it; would they be allowed to hire lawyers to find out such information, and who would pay the costs of registering the award or of translating it if a translation was required for registration purposes? Those were questions which would be very difficult to resolve at the end of the proceedings and which therefore should be clarified at the outset. To sum up, his delegation favoured retaining (ii) in section Q, which would require amending the title of the section, a task that could be left to the secretariat.

Chapter III, section R

12. Mr. ABASCAL ZAMORA (Mexico) suggested that it might be better if section R formed a separate chapter of the draft Guidelines - chapter IV, for example - and contained information along the lines of that contained in the current section, which should be borne in mind in multi-party arbitration.

13. Mr. HOLTZMANN (United States of America) said that multi-party arbitration was an extremely complex issue, and he commended the secretariat for having handled it quite well. However, some parts in which the arbitrators were told how to proceed should be deleted, since those issues ought to be resolved in accordance with the circumstances of individual cases and deferred until there was greater consensus in the arbitration community as to how such cases should be handled.

14. In paragraph 4, the first sentence should be retained and the remainder of the paragraph deleted. In addition to creating problems similar to those already indicated, paragraph 6 seemed to suggest in its final sentence that a party did not have to be present at some of the hearings. When an arbitration involved more than two parties, UNCITRAL should avoid any suggestion that it was not entirely up to the parties to decide whether they wished to be present or not. In summary, subject to those two deletions, his delegation approved section R.

15. Mr. GRIFFITH (Observer for Australia) said that it might be better to include paragraphs 1, 2 and 3, which were helpful in defining the main characteristics of a multi-party arbitration, in the introduction to the draft Guidelines. He also suggested that the secretariat should consider the impact which multi-party arbitration might have on other parts of the document, such as section F, on documentary evidence.

Chapter III, section T

16. Mr. ABASCAL ZAMORA (Mexico) said that there was something missing in the draft Guidelines, since no reference was made to the admissibility or evidentiary effect of instruments transmitted by means of electronic data interchange (EDI) or other similar methods. That issue would arise with increasing frequency in international arbitration, given the growing use of EDI. The secretariat should take into account the results of the work of the Working Group on Electronic Data Interchange in order to incorporate them in the Guidelines where appropriate.

17. Mr. HOLTZMANN (United States of America) said that he fully agreed with the representative of Mexico regarding the need to take into account the impact of electronic data interchange. Another matter which should perhaps be included in the Guidelines had to do with communication between the parties and the arbitral tribunal. The parties might be uncertain as to the most appropriate ways of communicating with the tribunal, particularly in cases involving special arbitration or where the arbitral institution did not have an established procedure. It would be helpful if one of the topics of the preparatory conference that the arbitrators and the parties could jointly discuss was the most appropriate way of communicating with one another.

18. Mr. CHOUKRI SBAI (Morocco) brought up an issue which arose in the legislation of his country, namely, situations in which the death, withdrawal or illness of an arbitrator terminated an arbitration unless the agreement between the parties provided otherwise or they agreed that it should continue.

19. Mr. SEKOLEC (International Trade Law Branch) said that the matter normally was resolved by the arbitration rules being applied; it was therefore unnecessary to include it in the draft Guidelines.

20. Mr. JONKMAN (Observer for the Permanent Court of Arbitration) said that he would recommend to his organization and to arbitrators that they should use the Guidelines as soon as they were issued. He felt that they could prove quite useful, not only because the provisions governing an arbitration were usually inadequate, but also because arbitrators generally were not very experienced with international arbitration.

21. The CHAIRMAN said that before moving on to the next item on the Commission's agenda he wished to know the Commission's views on how to proceed in the future with regard to the draft Guidelines. It had already been agreed that the secretariat would compile the results of the initial discussion and consolidate them later on with those of the Congress of the International Council for Commercial Arbitration (ICCA) to be held in Vienna in November 1994. The Commission might wish to decide at the current stage whether those results should be reviewed by a working group or perhaps by a group of experts which would meet during the first quarter of 1995, before they were submitted to UNCITRAL at its twenty-eighth session, which would probably be held in Vienna in May 1995.

22. Mr. BURMAN (United States of America) said that in view of the positive outcome of the current debate, his delegation had changed its mind and believed that it might be useful to convene a working group to consider the draft Guidelines prior to the Commission's twenty-eighth session in order to help UNCITRAL complete its consideration of the item. However, before a decision was taken, it must be borne in mind that UNCITRAL might have before it at its next session two documents which required priority attention, one relating to independent guarantees and the other to electronic data interchange. Consequently, the best course of action would seem to be for the secretariat to consolidate the results of the current debate with those of the forthcoming ICCA Congress, perhaps with the help of a group of experts, and for the Commission to decide in 1995, in the light of its workload, whether to convene a working group to accelerate consideration of the draft Guidelines.

23. Ms. VERRALL (United Kingdom) endorsed the United States proposal, since she did not feel it was necessary to convene a working group before the Commission's twenty-eighth session. The secretariat could convene a working group immediately following the November Congress of the International Council for Commercial Arbitration and consolidate the results in a document which it would transmit to delegations sufficiently in advance for them to be able to consider it thoroughly before the twenty-eighth session.

24 The CHAIRMAN suggested that, after considering the document to be prepared by the secretariat, delegations should send their written observations to

facilitate its later work, particularly with regard to the various language versions of the text.

25. Mr. BONELL (Italy) said it was unfortunate that only a few delegations, including his own, wanted the Commission to take a decision on the procedure to be followed in the future regarding the draft Guidelines. He disagreed that it was not the right time to take a decision, and he did not think that the future of the text should be made contingent on the results of the work of other forums, such as ICCA, perhaps consolidating them through an informal working group. It would be far more appropriate for the Commission itself to take a decision on the matter.

26. Mr. RENGER (Germany) said that the Commission should not spend additional time on a second review of the Guidelines or try to turn itself into a drafting group, since it was not drawing up a legal instrument. Agreement had already been reached on the principles, and the Commission should be able to conclude its consideration of the item at its next session.

27. Mr. CHOUKRI SBAI (Morocco) said he was pleased that ideas and opinions from different legal systems had been expressed in the Commission. Since it was not a legislative body, the Commission should endeavour to reach compromises, which would benefit those who used arbitration.

28. The CHAIRMAN said that it was up to the secretariat to decide whether to convene a group of experts in order to facilitate and expedite the Commission's work at its next session. He added that the Commission had concluded its consideration of the agenda item.

The meeting rose at 4.25 p.m.